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Supreme Court, U.S.
FILED

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No. -----

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term , 1995

ROMEO O. SPAULDING, ET AL.,

Petitioners,

vs.

MARION S. BARRY, JR., ET AL.,

Respondents,

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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27 December, 1995

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QUESTIONS PRESENTED

1. Whether one plaintiff in a class action suit brought by ten plaintiffs, may consent to the violation of due process and the separation of powers of Article III for the nine non-consenting plaintiffs and class representatives, by implication, where the one merely agreed to pay one-third of the special master's compensation for a period of four months.

2. Whether the Circuit Court fundamentally altered the constitutional standard that the constitutional rights attach to the individual plaintiffs and class members in he District of Columbia by allowing to let stand the application of the race standard applied in Dred Scott v. Sandford, 60 U.S. 393 (1856).

PARTIES TO THE PROCEEDINGS BELOW

1. Appellants, Petitioners in this Court, appeared below as individually named parties on their own behalf and on behalf of all persons similarly situated in No. 94-7147, consolidated with No. 94-7185, as follows: Marvin K. Hammon; Ralph J. Rust; Albert E. Montgomery; Samuel E. White, Sr.; Larry K. McMillan; James E. Peters; Romeo O. Spaulding; Ronald A. Gross; Laura Samuels; Rose L. Queen; and Gregory R. Lee. The Progressive Fire Fighters Association brought the action on its own behalf, on behalf of past and future employees of the Fire Department, and on behalf of its members.

Appellees below, Respondents in this Court, in No. 94-7147 and No. 94-7185, are the Mayor of the District of Columbia, the Director of the D.C. Office of Personnel, the Fire Chief of the District of Columbia, and the District of Columbia.

Related Cases-Motion To Consolidate Related Cases Denied

2. Appellants below in related case, *Allen, et al., v District of Columbia, et al.*, No. 93-7046 are Joseph W. Allen; Charles J. Drumming; Romeo O. Spaulding; Carl D. Chism; Robert E. Wright; and Charles Redding. This litigation arose under the Civil Rights Act of 1866, 42 U.S.C. 1981, the Civil Rights Act of 1871, as amended, 42 U.S.C. 1983, the Fifth Amendment to the Constitution of the United States, and 42 U.S.C. 2000,et seq., alleging that the District of Columbia, et al., had reinstituted and were maintaining and engaging in a pattern and practice of discrimination in the terms and conditions of employment against African Americans based on race in the operation of the District of Columbia Fire Department, pursuant to the reports and order of the special master appointed in *Hammon, et al., v. Barry, et al.*

Appellees below, Respondents in this Court, in *Allen,* No. 93-7046, are The District of Columbia, a municipal corporation.

International Association of Firefighters, Local 36, is a permissive intervenor in the *Allen* case, No. 93-7046.

3. Appellants below, Respondants in this Court, in related case styled *Hammon v Barry,* No. 93-7098 and No. 93-7099, consolidated with No. 93-7205 and No. 93-7206, are the Mayor of the District of Columbia, the Director of the D.C. Office of Personnel, the Fire Chief of the District of Columbia, and the District of Columbia. The appeal involved $750 Thousand attorney's fees granted to Local 36, a non-party to the Hammon case on the amended complaint, by the special master.

Appellees below in related case No. 93-7205, Petitioners in this Court, are Marvin K. Hammon; Ralph J. Rust; Albert E. Montgomery; Samuel E. White, Sr.; Larry K. McMillan; James E. Peters; Romeo O. Spaulding; Ronald A. Gross; Laura Samuels; Rose L. Queen; Gregory R. Lee; and the Progressive Fire Fighters Association.

Appellees below in related case, styled *Hammon v Barry,* No 93-7206 are Local 36, IAFF; Kevin Michael Byrne; Curtis J. Callaway; Ronald J. Danner; James A. Funk; Thomas I. Herlihy; James Worth Lane; Stuart J. Winokur; John E. Yocum; and David E. Zollars, representatives of a class of "all white persons who took the examinations that were given in 1984 for promotion to the ranks of Sergeant, Lieutenant and Captain in the D.C. Fire Department and are on the promotion lists prepared by the Department".

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No. _____

In The

Supreme Court of the United States

October Term , 1995

ROMEO O. SPAULDING, ET AL.,

Petitioners,

vs.

MARION S. BARRY, JR., ET AL.,

Respondents,

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

Petitioners, Romeo O. Spaulding, et al.,respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered September 28, 1995, and the Order denying consolidation of the cases on appeal entered on February 24,1995.

OPINIONS BELOW

The District Court opinions, App. B, are reported at 812 F.Supp 1239 (D.D.C. 1993); 830 F. Supp. 11 (D.D.C. 1993); 845 F.Supp. 6 (D.D.C. 1993). The Circuit Court rendered opinions, are unreported and are reproduced in Appendix A. A related case, *Hammon v. Kelly*, is reported at 980 F.2d 785.

JURISDICTION

The Circuit Court rendered its opinion in this matter on September 29, 1995. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit by Writ of Certiorari pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

Amendment V (1791).

No person shall...be deprived of life, liberty, or property, without due process of law;

Article III, Section I. (1787)

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATEMENT OF THE CASE

This class action was filed in the United States District Court for the District of Columbia on March 22, 1984, seeking enforcement of an administrative order under 42 USC 2000(e). On May 24, 1984, a Consent Order was entered. On June 27, 1986 a race neutral joint stipulation

and order on the development of new promotion procedure for the Fire Department was entered, and settled the promotion requirements of the 1984 Consent Order. An Amended Complaint, was filed and Answered by the District of Columbia on May 20, 1987, seeking remedies under the Civil Rights Act of 1866, the Civil Rights Act of 1871, as amended, and the Fifth Amendment to the Constitution of the United States.

On April 18, 1990, the District Court referred the case, for a four month period, under F.R.Civ.P. 53 to a private attorney as special master to achieve settlement of the case. Unable to achieve settlement within the period of the reference, the special master requested extension of the reference for a year, over the objection of Petitioners.

On September 12, 1990 the District Court extended the reference for a year and gave the special master the power to deny the Petitioners their due process rights for a period of four years. On October 1, 1991 the District Court extended the appointment of the special master for three (3) months until December 31, 1991. On January 27, 1992 the District Court extended the period of appointment of the special master until May 1, 1992. In its fourth order of reference, dated April 1, 1992, the District Court extended the reference to May 31, 1992, in order to assist the court "... with the tasks specified in the Orders issued of even date herewith". On June 28, 1993 the District Court continued the appointment of the special master until certain tasks were completed. . On August 10, 1994 the Final Report and Recommendation of the special master was filed.

Petitioners appealed the September 12, 1990 orders. During the pendency of the appeal, the District Court issued an order on November 6, 1990 approving a Settlement

Agreement [1] dated August 20, 1990, and adopting a proposed Consent Decree that Petitioners did not accept or sign. The District Court issued no substantive orders or took no action in the *Hammon* case during the pendency until 1992. On May 16, 1991 the Circuit Court dismissed said appeal on the grounds that the September 12, interlocutory orders did not become effective so as to vest that Court with jurisdiction once the District Court entered its final order.

Petitioners sought an emergency petition for a writ of mandamus to review the reference of the special master. On February 14, 1992, the Circuit Court issued an Order, per curiam, which denied the petition seeking removal of the special master, but stated:

> *We anticipate that the district court will superintend the expeditious conclusion of the matters before it, mindful that reference to special masters are exceptional. See In re:; Bituminous Coal Operator's Association, No. 91-5276, slip. op. at 8 (December 10, 1991).*

All actions taken by the special master and orders issued by the District Court, during the appeal and through 1991 involved promotions, pursuant to the proposed Consent Decree in *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990), and involved the subsequent, related case of *Allen v. D.C.*, 812 F.Supp. 1239 (D.D.C. 1993).

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[1] The Settlement Agreement was a redraft of an October 1989 settlement agreement between a then non-party, Local 36 and Petitioners, which agreement was a precondition to Respondents beginning negotiation of a comprehensive Consent Decree. See *Gardner v. A.H.Robins Co., Inc.* 747 F2d 1180,1186-87 (8th Cir.1984).

Petitioners appealed each successive extension of the order of reference to a special master. Each appeal was denied on procedural grounds.

The District Court dismissed the case on June 29th, 1994.

Statement of the Facts

In March, 1990 the District of Columbia and the Hammon plaintiffs negotiated a comprehensive Consent Decree settling all outstanding issues in the litigation. After securing the approval required by D.C. Law, the City refused to sign the Consent Decree, whereupon Petitioners moved for enforcement thereof or, in the alternative, for the District Court to decide pending motions on the liability phase of the litigation, so that the parties could proceed to trial.

The District Court, did not decide the motion, and on April 18, 1990, issued an order of reference, pursuant to Fed.R.iv.P. 53 to a private attorney, as special master, to render a report regarding settlement within a four month period. Under the pressure of a docket crowded with the criminal drug sentencings, the district judge after the four month reference had ended, referred the civil rights case, involving the present effects of the *de jure* segregation of the District's Fire Department, pursuant to Fed.R.iv.P. 53, as special master, virtually for all purposes over a period of four years, over the objections of Petitioners.

The District Court, on February 16, 1993, filed a Notice and four exhibits to the clerk of the United States Court of Appeals for transmittal to the members of that Court handling the then pending petition for rehearing and suggestion for rehearing *en banc* to suggest that petitioners' counsel of record be replaced by one of its appellate mediators along with the special master. {App.B }.

The segmentation of petitioners' case by the special master and District Court into discretely considered segments, involving non-parties who were allowed to file pleadings and participate in the special master proceed-

ings, and issues not involved in the litigation, led the Circuit Court to erroneously deny petitioners' motion to consolidate four(4) of the cases and thereby failed to consider the reference in its totality.

ARGUMENT

1. Whether one Plaintiff, in a class action suit brought by ten plaintiffs, may consent to the violation of due process and the separation of powers of Article III for the nine non-consenting plaintiffs and class representatives, by implication, where one plaintiff merely agreed to pay one-third of the special master's compensation for a period of four months.

The Circuit Court, within fifteen months of the reference herein, held *in Re: Bituminous Coal Operator's Association*, 949 F.2d 1165 (D.C, Cir. 1991), "the blanket reference, which included trial of the issues of liability, was beyond the district court's authority to order".

At least two other Circuit Courts have held that the Constitution prohibits the nonconsensual reference of a fundamental issue of liability to an adjudicator who does not possess the attributes Article III demands.[2] The Circuit Court below did not indicate that they considered the admonition contained in the February 14, 1992 order dismissing the writ of mandamus. The Circuit Court on September 29, 1995 entered a decision in conflict with the decisions of two other United States courts of Appeals, as well as its own decision on the same important matter; and has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this court supervisory power.

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[2] *Stauble v.Warrob*, 977 F.2d 690,695, citing *Burlington N.R.R. v. Dep't of Revenue*, 934 F..2d 1064, 1073 (9th Cir. 1991); *In re: United States*, 816 F. 2d 1083, 1092 (6th Cir.1987);

The Circuit Court's finding that one individual plaintiff, the Defendants and then non-party Local 36, by agreeing to pay one-third of the special master' s fee before the initial reference, provided the consent of nine other individual parties to the initial reference was error. It is tantamount to saying that by implication, Petitioners' consented to a waiver of their constitutional rights to due process and the constitutional prohibition of the reference of a fundamental issue of liability to an adjudicator who does not possess the attributes Article III demands. No such waiver was anticipated by petitioners, sought by the District Court or can be found in the record of these cases. F.R.Civ.P 8 (c) requires that a waiver must be set forth affirmatively. This was not a reference of the task of implementing remedies once liability has been determined.

The District Court entered an unsigned Consent Decree without the required due process notice or a fairness hearing, which the Circuit called a "decree" ignoring this Court's holding 106 S.Ct. *Evans v. Jeff D.*, 106 S.Ct. 1531, 1537 (1986), which held:

> *Rule 23(e) wisely requires court approval of the terms of any settlement of a class action but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to agree to a settlement to which they have not agreed*

2. Whether the circuit fundamentally altered the standard requiring that Constitutional rights attach to the individual plaintiffs and individual class members in the District Of Columbia by allowing to let stand the application of the racial standard applied in *Dred Scott v. Sandford*, 60 US 393 (1856).

This case raises concerns that are central not only to the principles underlying Article III, but also to the principles underlying the Fifth Amendment. Analysis of this case is consistent with this Court's recognition that racial

discrimination is fundamentally at odds with our constitutional guarantee of equal protection. The protection afforded by the Fifth Amendment should not be left at the Courtroom door. Nor should equal protection be denied to the individual members of a class action. "Discrimination on the basis of race, odius in all aspects, is especially pernicious in the administration of Justice." *Rose v. Mitchell* 443 U.S. 545, 555 1979.*cf: McClesky v. Kemp*, 481U.S. 343 (1986).

A full decade ago Justice Powell, writing for the court, noted: "Discrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Batson v. Kentucky,* 476 U.S. 79, 87-88 (1986), quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

At oral argument, the Circuit Court indicated that the reason the Petitioners did not receive any relief in the district court were the result of "a difference of opinion", rather than "fraud on the part of the special master", focused our understanding that the racial holding of *Dred Scott v. Sandford.* 60 U. S. 393, (1856) is alive and well and the "Law of the Land" in the District of Columbia.

Appellants have traced that difference of opinion to the opinion expressed in the *Dred Scott* decision. The racial holdings of *Dred Scott,* begins with the question and answer posed at 403-405:

> *Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suirig in a court of the United States in the cases specified in the Constitution. [And] ... whether the (descendants of such slaves, when they shall be emancipated, or who are born of parents who had became free before their*

birth, are citizens of a State.

We think they are not, and that they are not included, and were not intended to be included, under the word 'citizen' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race,and whether emanci pated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Governent might choose to grant them.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. Id.at 407 .

Mr. Justice Taney went on to say that the language of the Declaration of Independence is equally conclusive. He then proceeds to say: *We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inaleienable rights; that among them is life, liberty, and the pursuit of happiness...' The general words above quoted would seem to embrace the whole human family' ... 'But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration'. Id.at 409. But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.*

> In a concurring opion, Mr. Justice Wayne stated at *454* : The opinion of the court meets fully and decides every point which was made in the argument of the case by counsel on either side of it. Nothing belonging to the casehas been left undecided, nor has any point been discussed and decided which was not called for by the record, or which was not necessary for the judicial disposition of it, in the way that it has been done, by more than a majority of the court.

The special master, using the full autbority granted him under Rule 53, the settlement Agreement and the proposed Consent Decree, to begin to "interpret" in 1992, the proposed Consent Decree and to conclude [3] that all blacks in the Fire Department were members of the *Hammon* class, and dismissed the *Hammon* Amended Complaint; dismissed the *Hammon* attorney as counsel for petitioners; made himself sole trustee of the "*Haamon* Special Fund" and distributed $3.4 Mil. to "all blacks who without showing any nexus between the named plaintiffs and each claimaint.[4]

3 The special master reasoned that the 13th, 14th and 15th Amendments to the Constiution applied to the States. That after the Civil War Amendments attempted to override only portions of Dred Scott, supra., that the racial theory of the decision was still applicable to the District of Columbia which is under the plenary discretion of Congress. Thus he could apply Dred Scott to Petitioner's case involving African American employees of the District of Columbia.

4 The district court and Circuit Court ignored this Court's reemphasis of the fact that a close nexus between the named plaintiff's individual claims and the claims of the class must be shown when plaintiffs represented several groups who experienced different types of discriminatory practices as was this situation. See, General Telephone Co. of the Southwest v. Falcon, 457 U.S.147, note 1 at 160 (1982).

He also litigated issues of a non-party, Local 36, and awarded their counsel $750,000.00 for attorney's fees and costs. Moreover, the special master litigated the issues of liability of *Allen v. District of Columbia*, 812 F.Supp. 1239 (D.D.C. 1993), pursuant to the racial theory of *Dred Scott*. {See App B} based on the special master's theory that the Civil Rights Amendments to the Constitution apply to States, and that the District of Columbia which is not a State but is governed by the plenary powers of Congress continues to be subject to the *Dred Scott* decision.

In adopting the recommendations and reports of the special master, the District Court forfeited the concept of justice in order to cover the errors and omissions of the court selected special master who, attempted to wield judicial power that he did not possess. Thereafter, the Circuit Court ignored this important question of federal law that should be settled by this Court. [5]

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[5] This argument is intended to include as "subsidiary questions" within the meaning of Supreme Court Rule 14.1 these questions:

1. Whether the Circuit Court erroneously segmented petitioners' claims into discretely considered segments and thereby failed to consider the case in its totality;

2. Whether the Circuit Court erred in affirming the district court's refusal to grant petitioner;s motion for interim attorney's fees.

3. Whether the Circuit Court erred in finding that the district court could require the petitioners to accept a settlement to which they have not agreed.

4. Whether the Circuit Court erred in summarily affirming the district court's 1994 orders directing the final disbursement of the settlement and entering satisfaction of the judgment.

CONCLUSION

As Mr. Justice Powell stated in *Fullilove v. Klutznick*, 448 U. S. 448 (1979), at 515:

> In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race.

The time cannot come too soon when no govermental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.

The record in this case cries out to this Court to consider this issue of utmost importance in this protracted and publicized case involving past and present employees of the Fire Department, which operated under *de jure* segregation three decades ago in the District of Columbia, and whose rights are being ignore today by virtue of the racial theory of *Dred Scott v. Sandford, supra.*

Petitioners respectfully request that this Court issue its Writ of Certiorari to review the challenged decisions of the United states Court of Appeals for the District of Columbia Circuit.

Respectfully submitted, December 26, 1995.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marvin K. Hammon, et al.,

Appellant

v.

Marion S. Barry, Jr., et al.

Appellees

No. 94-7147
Consolidated with
No. 94-7185

Filed Sept 29,1995

Appeals from the United States District Court
for the District of Columbia
(No. 84cv00903)

Before: EDWARDS, Chief Judge, SENTELLE and TATEL, Circuit Judges.

JUDGMENT

This cause came to be heard on appeal from several orders of the United States District Court for the District of Columbia, and was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. See D.C. Cir. Rule 36(b). For the reasons stated in the accompanying memorandum it is

ORDERED and ADJUDGED that the orders of the District Court be affirmed.

The Clerk is directed to withhold issuance of the mandate herein unto seven days after disposition of mlny timely petition for rehearing. See D.C. Cir. Rule 41.

MEMORANDUM

In these consolidated cases, appellants challenge the district court's 1994 orders directing the final disbursement of the settlement fund (No. 94-7147) and entering satisfaction of thejudgment (No. 94-7185). For the reasons stated below, we reject appellants' arguments and affirm the disttict court's orders.

Appellants' central contention is that the district court's appointment of a special master in 1990 and its several subsequent renewals of that appointment violated Federal Rule of Civil Procedure 53, and that therefore all orders based on the reports and recommendations of the special master over a four year period should be reversed. The record indicates, however, that each of the three parties, including appellants, agreed to pay one-third of the special master's fee before the initial reference, thereby providing their consent to the initial reference. Furthermore, all of the parties implicitly consented to the extension of the reference by signng the settlement agreement of August 20, 1990; that agreement clearly contemplated additional duties for thespecial master. Therefore, the district court's appointment of the special master and renewals of that appointment were proper.

Appellants make several other arguments, all of which we reject. First, appellants contend that the settlement agreement required that a more detailed decree be signed by the parties andthat because no subsequent decree was ever signed by all of the parties, the settlement agreement itself is invalid. Nowhere however, does the signed settlement agreement indicate that its validity is contingent on the signing of a subsequent consent decree. Indeed, the agreement specifically refers to a "decree" not to a "consent decree," and a decree was in fact entered on November 6, 1990, less than four months after the settlement agreement.

decree and the settlement agreement with regard 1986 Stipulation and Order Regarding Development of Promotional Procedures However, since the decree is a final Order, see *Hammon v. Barry*, 752 F, Supp- 1087, 1102 (D.D.C, 1990), any challenge to it is time-barred as not having been appealed within 30 days. S*ee, e.g.. Gardner v. A.H. Robins Co., Inc.*, 747 F.2d I I 80, I 1 86-87 (8th Cir. 1984) (district court's alteration of settlement agreement was appealable Order where alteration "attached a material condition to the judgments of disrnissal ... so that the dismissals qualify as involuntary adverse judgments").

Third, appellants argue that the district court judge failed to set the special master's fee in advance. While the district court judge may have erred by not doing so, seeRule53(a), appellants made no contemporaneous objection, thereby waiving their right to a subsequent appeal on this issue. Moreover, the district court specifically found that the special master's fees were "fair and reasonable and accurately reflect[ed] the value of services and expenses duly rendered," *Hammon v. Barry*, Civ, No, 84-0903, Order (D.D.C- Mar. 31, 1992), at 2, and appellants have made no showing that the fees were unreasonable.

Lastly, appellants argue that the district court abused its discretion by referring to the special master an interim attorney's fees motion that had been pending for three years, and by then accepting the special master's ruling on that motion, Appeilants did not appeal the November 6, 1990 order adopting the spedal master's division of that interim attomeys' fees award, but did appeal the Augu3t 30, 1993 order disbursing those fees, No. 93-7232. This Court dismissed that appeal for want of prosecution. *Hammon v. Kelly*, 1994 WL 549611 (D. C. Cir. Sep. 15, 1994).Thus, appellants are foreclosed from appealing the merits of their entitlement to those fees.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1994

No. 93-7046

MARVIN K. HAMMON, et al.,

v.

MARION S. BARRY, JR., et al.,

BEFORE: Wald, Williams, and Ginsburg, Circuit Judges

ORDER

Upon consideration of the Hammon appellants' motion to consolidate, the oppositions thereto, and the reply; the request for an order to show cause under Rule 46(c); the motion for suspension of rules, the oppositions thereto, and the request for issuance of a briefing schedule in No. 93-7205 and consolidated cases; the motion to strike pleading of non-party, the opposition thereto, and the reply; the notions to dismiss Nos. 94-7147 an 94-7185 in part and the oppositions thereto; the action to permit filing of the motion to strike and opposition to the motion to dismiss No. 94-7185 in part out of time; the court's order show cause filed September 12, 1994; the Allen appellants, fourth transcript preparation status report, response to court's order to show cause, and
request for briefing schedule and the response thereto; the Allen appellants, motion to consolidate, the oppositions thereto, and the replies; the motion for extension of time to file reply; the motion for leave to amend statement of issues, it is

ORDERED that the Hammon appellants' motion to con-

consolidate be granted in part. Nos. 94-7147 and 94-7185 shall be consolidated and No. 94-7147 shall be designated the lead docket. it is

FURTHER ORDERED that the motion to permit filing of motion to strike and opposition to the motion to dismiss No. 94-7185 in part be granted. The Clerk is directed to file the lodged leadings. It is

FURTHER ORDERED that the Motion to strike pleading of non-party be denied. Local 36, International Association of FireFighters, is a party to No. 93-7205 and as such was entitled to oppose the motion to consolidate and request the issuance of an order to show cause on sanctions. It is

FURTHER ORDERED that the Hammon appellants' counsel Joan A.Burt pay appellee Local 36 three-fourths of the attorneys, fees incurred by the Local in responding to the October 28, 1994 motion to consolidate. See D.C.. cir. Rule 38; Fed. R. App. P. 46(C). The motion to consolidate is frivolous in part, as we denied a prior motion to consolidate three of the four appeals on October 6, 1994, appellants have not convincingly shown that the oppositions to the prior motion contained material misrepresentations, and there is no basis for consolidating the fourth appeal (No. 94-7185) with two of the three remaining appeals (Nos.. 93-7205 and 93-7046). Furthermore, counsel improperly failed to mention the prior motion and the October 6 order in the October 28 motion to consolidate.

Local 36 shall file an itemized statement of the relevant fees within 20 days of the date of this order. Ms. Burt may respond to the statement within 10 days after it is filed. It is

FURTHER ORDERED that the motion for suspension of rules be dismissed as moot. We need not suspend the rules to reconsider the prior motion to consolidate or to consider the current motion, which includes one appeal not included in the prior motion. It is

FURTHER ORDERED that the motion for issuance of briefing schedule in No. 93-7205 and consolidated cases be granted. The Clerk is directed to issue a briefing schedule. It is

FURTHER ORDERED that the motions to dismiss in part be granted. We dismiss No. 94-7147 insofar as appellants challenge the district court's June 27, 1994 order directing them to show cause why the District of Columbia defendants' motion for entry of satisfaction of judgment should not be granted. We dismiss No. 94-7185 insofar as appellants challenge the district Court's August 1, 1994 order directing the parties to show cause whether class counsel should be sanctioned and removed. Neither order is final. See 28 U.S.C. S 1291. It is

FURTHER ORDERED, on the court's own motion, that No. 93-704 be dismissed for lack of prosecution. See D.C.. Cir Rule 38. The transcripts required for this appeal were completed in September 1993. Appellants did not, however, inform the court that the transcripts were complete or take any other action to prosecute the appeal until they were ordered to show cause why the appeal should not be dismissed for lack of prosecution September 1994. Because appellants, response to the order to show cause provides no explanation for this year-long delay, we dismiss the appeal for lack of prosecution. It is

FURTHER ORDERED that the Allen appellants' request for briefing schedule, motion to consolidate, motion for extension of time to file reply, and motion for leave to amend statement of issues be dismissed as moot.

The clerk is directed to file copies of this order in each of the above-captioned appeals.

The clerk is also directed to send a copy of this order to Joan A. Burt both by certified mail, return receipt requested, and by first class mail.

Finally, the Clark is directed to withhold issuance Of the mandate in No. 93-7046 pending disposition of any timely petition for rehearing, see D.C.Cir- Rule 41, and to withhold issuance of the mandate in Nos. 94-7147 and 94-7185 until resolution of the remainder of those appeals.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marvin K. Hammon, et al.,

Appellants

v.

Marion S. Barry, Jr., et al.

Appellees

No. 94-7147
Consolidated
with
No. 94-7185
(Filed
January 9,1995)

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and Consolidated Cases

Appeals from the United States District Court
for the District of Columbia
(No. 84cv00903)

Before: EDWARDS, Chief Judge, Wald, Silberman, Buckley,Williams ,Ginsburg, Sentelle and Tatel Henderson, Randolph, Circuit Judges.

ORDER

The Suggestion for Rehearing In Banc of Marvin K. Hammon, et. al., has been circulated to the full Court. No membe of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judge Rogers did not participate in this matter.

APPENDIX B

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D. C. 20001

March 10, 1992

Joseph W. All en
vs.
District of Columbi
Case No. 92-0555

Please be advised that the above entitled case in which you are counsel has been reassigned, by direction of the Calendar Comittee, to Judge Charles R. Richey for all purposes.
The Case Number will now carry the initials (CRR) of Judge CharleS R. Richey following the last digit. All matters previously set before Judge Revercomb: have been cancelled. ____xx____ remain unchanged:_____

_
No date set. This is a new filing.

If you have any questions, please call the Deputy Clark named below.

Sincerely yours,
Nancy MAYER-WHITTINGTON,
Clerk

By :_____

Deputy Clerk (535-3540,

cc: Chambers
Courtroom Deputy
File

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MARVIN K, HAMMON, et al., FILED

Plaintiffs-Appellants, FEB 16 1993

v.

C ourt of Appeals No. 92-7067
MARION S, BARRY Civ. Action No. 84-903(CRR)
Civ. Action No. 85-792 (CRR)

Defendants-Appellees

Comes now Charles R. Richey United States District Judge for the District of Columbia, and hereby requests that the Clerk of the above-entitled Court inform the panel members in the above captioned case of the urgency and need for a decision on the pending peti tion for rehearing and suggestion for rehearing en banc filed on January 14, 1993.

The history of this case is a long and unhappy one, filled with incidents of friction and ill will betveen the partion. Thi suit is a class action which began with the filing of Hammon v. Barry, Civ. Action No. 84-903, by a group of African-American firefighters on March 22, 1984, almost nine years ago, seeking to enforce an order of the District of Columbia Of f ice of Human Rights instructing the District of Columbia Fire Department ("the Department") to inter alia, adopt an affirmative action plan. The implementation of this plan was challenged on March 8, 1985 by a group of white firefighters and their union in Bryne v. Coleman,

civ. Action No. 85-0872. T'he plan was also challenged by the United States in United States v.District of Columbia, Civ. Action No. 65-797. The cases vere consolidated by the District Court in 1985. The class action suit vas settled by the execution of a Settlement Aqreement requiring the D.C. governmen tto pay govis $ 3,500,000 to members of the Hammon Class.

From 1985 to 1990, both the District Court and the Court Of Appeals used an inordinate amount of judicial resources to resolve the merits of the dispute. The events of the period are well described in the brief submitted by the District of Columbia as Appellee in this most-recent appeal see pages 2-16, attached hereto and incorporated by reference as Exhibit 'A', but even brief overview shows that this period was filled with conflict.

In 1985, the District Court hold that the promotionl procedures in th affirmative action plan were unlawful, but that the hiring procedures were lawful. Hammon v. Barry, 606 F. Supp 1082 (D.D.C. 19 85) This decision was subsequently reversed only after substantial considerration, by the court of Appeals 813 F.2d 412 (D.C. Cir.), , 826 F.2d 73 (D.C.cir.), reh'g en banc granted 833 F.2d 367 (D.C. cir. 1967) (p er curiam), order granting rehearing en banc. 841 F.2d 426 (D.C. Cir.) (per curiam), 486 U.S. 1036 (1988).

In 1988, after remand by the Court of Appeals, the District Court endeavored to resolve the remaining issues in the case. In 1990, all of the parties agreed to refer the case to a Special Master for Settlement.

Once before, on April 2, 1992, the undersigned Judge urged the Court of Appeals to take swift action so that this case might finally be resolvad. See Memorandum to the Clerk of the Court, attached hereto incorporated by reference as Exhibit "C".

However, despite the efforts of both the District Court and the Court of Appeals, the disputes in Hammon continue. Now, as then, the District Court has no objection "to any party exercising any right to appellate review, " id. at 4, but wishes to make clear that it wishes to distribute the funds due the firefighters, as well as the interim fees, at least due the attorneys in as swift and efficient a manner as possible.

February 16, 1993

/s/ Charles R. Richey
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

MARION S. BARRY, *et al.*,
Defendants

Civil Action No. 85-782

KEVIN M. BYRNE, *et al.*,
Plaintiffs

v.

THEODORE R. COLEMAN, *et al.*,
Defendants

HAMMON PLAINTIFFS' POST-FAIRNESS HEARING REPORT TO THE COURT

[Filed October 3, 1990]

I. Introduction

As the Court is aware, the parties signed the Special

Master's Settlement Agreement on August 20, 1990.[1] Other than a typographical error corrected on page 3 of Part A, the only change made on said Settlement Agreement was at p 1 of Part A, whereby a more comprehensive consent decree was mandated to be developed by the Hammon plaintiffs and the City with the Special Master. Dr. Reid, Corporation Counsel, D.C. concurred with the Hammon plaintiffs and the Court, to wit, the decree would be a Consent Decree. Thereafter all drafts submitted by the parties and the Special Master proposed only a Consent Decree.[2]

On September 19, 1990, Hammon counsel noted changes to the Special Master's draft Consent Decree believed to be appropriate and necessary to protect the

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[1]Please note: August 10, 1990 cover letter to Appendix A of the settlement attached to Pre-Fairness Hearing Report of Special Master.

[2]The importance of a Consent Decree lies in the body of law developed by the federal courts relating to the effect, interpretation and governance of Consent Decrees, particularly as it relates to firefighter cases.

Under the settlement, if there is not a modification by the Court, the following effects, inter alia, will flow to said 19 named plaintiff claimants:

a. Seventeen (17) named plaintiffs will take nothing for the retaliatory acts taken against each (some acts were compounded against these plaintiffs for the ten (10) years that this suit has existed at the cost to them of between 20 to 100,000 Dollars each;

b. Marvin K. Hammon was employed by the DCFD in 1974, he was an exemplary employee and a member of the Truck Co. of the Year in 1976. In 1977 he and his family moved to Louisiana and he resigned in good standing.

He returned to the District in 1979 and sought reinstatement but was told he had to take the 1980 entry level exam. He did so and passed with an 85 but was not rehired. He contacted the PFA and was involved in the 1981

administrative suit before OHR-EEOC. He was hired from the 1980 list in 1985.

DCFD erroneously required him to be rehired instead of being reinstated at his rank and grad level -- a 6 year man.

Had DCFD rehired him in 1979, by 1985 he would have been eligible to take the 1982 Sergeant's exam, 1984 lieutenant's exam and would be eligible for promotion by virtue of the current Settlement Agreement to a Lieutenant.

When he was rehired in 1985, he was brought on board as a 1 year man's salary rather than at an 11 year man's salary. He also lost $91,908.93 in back pay during the years 1981-1985.

As a result of his participation and use of his name in the instant suit he suffered retaliation and harassment as well as money. The stress also caused him to lose time

from work and cost him his family.

One other firefighter claims under him - Larry K. McMillan. He is also a named plaintiff:

b. Larry K. McMillan was hired off the 1988 entry level list, however, he was not hired until 1981. He therefore was not a DC Firefighter on January 1, 1980.

He was in training with the 1980 class and finally was sent to a firehouse where he was subjected to great harassment by white officers and thereafter was placed on administrative leave without pay and filed a declaration in the instant case in 1986.

He was subjected to similar discriminatory practices that blacks were selectively subjected to in the 1950, 1960, and 1970's. See Declaration: Wherein he states that when he was subjected to discriminatory treatment during training because of his race and filed grievances, he was retaliated against and denied sick leave with pay or light

duty for the aggravation of injuries receive in performance of duties which was receive by similarly situated whites. He documents the loss of more than $70,000 as a result of said discrimination and retaliation.

c. Pamela D. Meachum is a black female applicant who took and passed the entry-level firefighter's exam. However, due to the stay imposed on all hirings, plaintiff reached the age of 29 and was removed from the list of eligibles. By virtue of the 1984 Consent Decree between the Hammon plaintiffs and the District she was never hired although she was made eligible by virtue of that Consent Decree. No report was filed by the City indicating that she was hired or reasons for her non-hire.

There are several others who claim under her category, including Ralph J. Rust, a named plaintiff.

d. Ralph J. Rust was alleged to be overweight in 1985 when he responded to accept the job offer pursuant to

the 1984 Consent Decree. There are others who take under him. He documents losing more than $15,000.

e. Albert Montgomery is also a named plaintiff who took the 1980 exam and is similarly situated to Meachum and Rust. However, he was hired by the 84 Consent Decree in 1985, but he lost 4 years of pay, fringe benefits, job experience and training opportunities and preferences that white hires from the 1981 hiring received and will retain through their respective careers. He documents the loss of more than $90,000 as a result of said discrimination. Please note that he won his case of harassment and/or retaliation before OHR on 8-30-89 without monetary relief.

There are others who take under him.

Duane R. Hughley and 17 others at about $50,000 each.

f. Samuel E. White, Sr. took and passed the

1980 exam and was not selected due to alleged medical reasons resulting from discriminatory application of other selection procedures because of his race. He is alleged to have imperfect hearing, but a follow-up test at Galludet College indicated that his hearing was above what was needed to be a fireman; the job he wouldn't qualify for was a concert violinist because of a Higher E that he cannot hear. He documents more than a $60,000 loss.

Three others claim under him.

g. James E. Peters is a black Fire Inspector who has been denied promotional opportunities since 1972 when dependent rules were changed to require inspectors in the Fire Prevention Division to take non-job related Fire Suppression promotional exams. As a further result of his participation in the DHR hearings he was subjected to acts of reprisals and retaliation.

Twelve (12) others claim under him at $30,000 each.

h. Romeo O. Spaulding is a black Sergeant who qualified to be hired in 1962 but was denied hiring until 1965, thereby losing three qualifying years for taking sergeant's exam. He is a principal participating named plaintiff who was retaliated against by threats to his life, damage to his automobile, denied acting promotion pay. He has documented his injuries to exceed $100,000.

Four others claim under him in excess of $100,000.

i. The Progressive Fire Fighters Association challenges the hiring and employment practices and policies of the department and claim $120,000 costs in litigating this suit for ten (10) years.

j. Ronald A. Gross was hired in 1968. He was on the 1980 promotion list for Sergeant, on or before November 23, 1982. The defendant knew and was aware that the 1980 and 1982 promotion selection process resulted

in an adverse impact on black candidates and was discriminatory, and failed to take steps to lawfully remedy the discrimination. Instead, defendant knowingly and intentionally caused him to be promotion on March 8, 1985 improperly. He served as sergeant until April 1, 1985 when the promotion was declared void by the Court. As a result he suffered embarrassment, humiliation, mental distress and lost pay. He calculates the loss at $100,000.

Four others claim under him at $100,000 each.

k. Laura Samuels is a black female who was retaliated against for OHR testimony and threatened and resigned. She claims a loss of more than $20,000.

l. Rose Queen and Gregory Lee claim under Laura Samuels and in their own names at $20,000 each.

Four others claim under them at $20,000 each.

Although there is no rule that settlements benefit all class members equally, Kineade v. General Tire & Rubber

Co., 635 F.2d 501, 506 n5 (5th Cir. 1981), a disparate distribution excluding the named plaintiffs required careful judicial scrutiny into whether the settlement allocations is fair to excluded members of the class. Holmes v. Continental Can Co., 706 F .2d 1144 (11th Cir. 1983).

The rule that appellate courts "must have a basis for judging the exercise of the district judge's discretion." Cotton v. Hinton, 559 F.2d at 1330, applies to the instant case where this Court must have a basis for judging the exercise of the Special Master's discretion.

Proponents of class action settlements bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate. Neither the defendants nor the Special Master have sustained their burden.